No. 81356-6
SUPREME COURT
OF THE STATE OF WASHINGTON

BIANCA FAUST, individually and as guardian of GARY C. FAUST, a minor, and BIANCA CELESTINE MELE, BRYAN MELE, BEVERLY MELE, and ALBERT MELE,

Petitioners,

v.

MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINKAID, deceased, LOYAL ORDER OF MOOSE, INC., MOOSE INTERNATIONAL, INC., JOHN DOES (1-10) (fictitious names of unknown individuals and/or entities) and ABC CORPORATION (1-10) (fictitious names of unknown individuals and/or entities),

and

BELLINGHAM LODGE #493; ALEXIS CHAPMAN,

Respondents.

FAUSTS' SUPPLEMENTAL BRIEF

Steve Chance, WSBA #19765
119 North Commercial Street
Suite 275
Bellingham, WA 98225
(360) 676-9700

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

James DeZao, NJBA #170288 (admitted pro hac vice)
DeZao & DiBrigida
322 Route 46 West, Suite 120
Parsipanny, NJ 07054
(973) 808-8900

Attorneys for Petitioners Faust

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Other Cases

Statutes

Other Authorities

A. INTRODUCTION

Bianca Faust, in her individual capacity and as the guardian of Gary C. Faust, Bianca Celestine Mele, Bryan Mele, Beverly Mele, and Albert Mele (Fausts), asks the Court to reverse the Court of Appeals and reinstate the judgment on the jury's verdict.[1]

In *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004), this Court addressed a plaintiff's burden of proof in a case involving a commercial establishment's overservice of alcohol to a patron who then injures a third party. The Court restored the statutory burden of RCW 66.44.200, requiring a plaintiff to prove the patron was "apparently under the influence of alcohol" as the burden of proof in such a civil action, abandoning the more stringent "obviously intoxicated" standard.

The Court of Appeals below held that a plaintiff could not prove the new *Barrett* standard by a combination of scientific evidence, circumstantial evidence, and the testimony of persons who observed the patron. Instead, that court reasoned that only direct observational testimony could satisfy the *Barrett* standard. This decision was

[1] The Bellingham Moose Lodge and Alexis Chapman are referred to collectively as the "Moose defendants."

particularly unfair here where the patrons at the bar were *all* affiliated with the fraternal organization that is the defendant and they had every reason to exhibit a skewed recollection of the actual service of the patron by their bartender. Also, the Court of Appeals failed to acknowledge and apply this Court's decisions holding postservice observational and scientific evidence could establish even the old, higher "obviously intoxicated" standard.

This Court should reverse the Court of Appeals and restore the jury's verdict. The Court should hold that the *Barrett* test for overservice can be met by observational testimony about the patron, scientific evidence, circumstantial evidence, postservice observational testimony, or any combination thereof.

B. ISSUE PRESENTED FOR REVIEW

Where the jury made significant decisions on Hawkeye Kinkaid's overservice and the credibility of the Moose defendants' witnesses, and there was substantial evidence from which the jury could infer that Kinkaid was apparently under the influence of alcohol at the Bellingham Moose Lodge bar, including an extraordinarily high BAC level and admissions by his bartender girlfriend Alexis Chapman that he was drunk at the bar when she terminated alcohol service to him, did the Court of Appeals err in vacating the jury's verdict, arrived at after a 3-week trial,

because the court misapplied this Court's decision in *Barrett* and Washington law on the evidence from which the trier of fact may infer a patron was overserved by a commercial establishment and caused harm to others?

C. STATEMENT OF THE CASE

The factual recitation in the Court of Appeals opinion is remarkable for the facts it omits. The court omits significant facts that bore on the jury's credibility decisions. It also omits facts that supported the jury's decision on the Moose defendants' liability for overservice of Hawkeye Kinkaid who then drove drunk and seriously harmed the Fausts.

Taking the evidence in a light most favorable to the Fausts, Chapman served an enormous number of alcoholic beverages to Kinkaid, her barfly boyfriend, at the Moose Lodge bar on April 21, 2000. Exceedingly drunk, Kinkaid left the Lodge and drove his van. Kinkaid crossed the centerline of a Ferndale road, smashing head-on into a car operated by Bianca Faust, with her children and a grandchild as passengers. Exs. 5-6, 10. Bianca and her daughter, Bianca Celestine Mele, were very seriously injured; Bianca Faust's seven-year-old son, Gary Christopher Faust, was rendered a paraplegic from the injuries he sustained in the massive collision. Br. of Appellants at 10-12. Kinkaid later died of his injuries from the collision. Ex. 9.

The Court of Appeals reversed a $14 million verdict rendered by the jury after a 3-week trial, in effect, reversing the trial court's order denying the Moose defendants' posttrial motions. The Court of Appeals gave scant attention to the trial court's extensive memorandum decision denying the Moose defendants' posttrial motions that touched on virtually every issue at trial. CP 839-44. *See* Appendix.

The Court of Appeals opinion either downplays, or simply ignores, the following facts that were before the jury:

- Hawkeye Kinkaid had not been drinking prior to 4:30 p.m., when he arrived at the Bellingham Moose Lodge bar with his girlfriend, Alexis Chapman. RP 427-31, 1737-38.
- Chapman had been with Kinkaid the entire day, from 12:30 p.m. onward. RP 427-31.
- Alexis Chapman was an experienced alcohol server who had been trained by the Washington State Liquor Control Board in recognizing persons under the influence of alcohol. RP 1108-10, 1692-99. *See generally,* RCW 66.20.300-350, ch. 314-17 WAC.
- Chapman had a history of slipping free drinks to Kinkaid at various bars where she worked. RP 451-52, 516-17.
- Chapman admitted to Kinkaid's daughter, Rainy, that he was drunk on April 21 at the Moose Lodge bar, he had been drinking for a prolonged period at the bar, he was belligerent and argued with her, and he was so "tipsy" that he should not be driving. RP 264-67.
- Chapman told Kinkaid's friend, Lisa Johnston, that he was so drunk at the Moose Lodge bar that she cut him off. RP 335.

- Kinkaid's ex-wife told the State Patrol he was drunk at the bar. Ex. 71.

- Kinkaid left the Moose Lodge bar at 7:30 p.m. RP 364, 670, 907-08; CP 1264; Ex. 10.

- The collision occurred at 7:45 p.m. Ex. 10.

- The parties stipulated to the fact Kinkaid was drunk at the time of the collision. RP 243-44. *See also*, RP 192 (medical examiner found Kinkaid was drunk at the time of the collision).

- Kinkaid reeked of alcohol at the collision scene. Ex. 10.

- Kinkaid's BAC at the collision scene was .032%, which means he must have consumed 21 twelve-ounce containers of beer or 30 ounces of 80-proof alcohol to achieve that level of intoxication. RP 232, 245.

- On autopsy, Kinkaid's stomach contents included 1.5 liters of liquid reeking of alcohol that had not been absorbed into his bloodstream so that it could even be measured in a BAC test. RP 202-05.

- The Moose defendants offered implausible explanations for Kinkaid's extreme level of intoxication. Chapman and other Moose Lodge members claimed Kinkaid drank only two beers at the Moose Lodge bar. RP 443, 540, 631-32, 1270-71, 1291-92, 1319-20; Kinkaid ordinarily did not drink beer. RP 270; CP 1264 (Ex. 1 to Ron Beers depo.). The Moose defendants offered the testimony of two witnesses, Richard Zoerb and Mac Pope, who claimed he was drinking beer at a local bowling alley after he left the Moose Lodge.[2] They could not get the time he left the bowling alley straight, RP 1677-79, the drinks he

[2] At Chapman's insistence, Zoerb signed a statement while he was drunk. RP 1678-79; Ex. 93. Chapman urged him to testify Kinkaid left the bowling alley at 9 p.m. RP 1677-79.

consumed, RP 1240, 1664, nor his clothing on the day in question. RP 1257-61; Ex. 86. More critically, their testimony was contradicted by the bowling alley proprietor and the waitress there who testified Kinkaid was not at the bar on April 21. RP 1808, 1811. It was further contradicted by Zoerb's girlfriend, RP 1667-68, 1813, and a local television station. RP 1669, 1805. The Moose defendants also tried to claim the fact an empty liquor bottle was found in Kinkaid's van was significant, Ex. 91-92; RP 1377-78, but no diet Pepsi was found there, Ex. 91-92, and it was undisputed Kinkaid never drank hard liquor without it. RP 395, 420, 512, 1742.

- The Bellingham Moose Lodge was suffering from hard financial times and its membership had declined at the time of Kinkaid's overservice. RP 551, 604, 1324; it was under heavy pressure from Moose International to remedy its financial status. Ex. 20, 21, 25, 26, 47, 84. The only way it could remedy its predicament was by increasing liquor sales. RP 616-17, 1026, 1655-56.

- The only people in the Moose Lodge bar who could testify to Kinkaid's appearance were Moose or Moose Auxiliary members who had strong ties to the fraternal organization and, strangely, could not recall who was in attendance at the Lodge on April 21. RP 431-35, 527-31, 537-38, 541, 590, 592, 1293, 1307-08, 1313, 1322-23, 1329-30; Ex. 19.

- The most direct evidence of the Moose "conspiracy of silence" was the testimony of Ron Beers; in his deposition, Beers recanted his sworn declaration in which he testified that Chapman had previously overserved patrons and that Kinkaid left the Moose Lodge bar between 7 and 7:15 p.m. RP 907-08; CP 1264 (Ex. 1); CP 1264 (at 16, 17, 30-31, 32, 33, 41).

The jury heard this evidence over a 3-week trial and was properly instructed on the law of overservice of patrons by a commercial establishment. In returning a verdict for the Fausts, the jury believed that

Kinkaid was overserved at the Moose Lodge bar on April 21 when he was "apparently under the influence of alcohol." CP 1120-22. The evidence here supported the verdict: Chapman cut Kinkaid off because he was drunk; the forensic evidence obtained minutes after he left the bar overwhelmingly support the jury's conclusion that Kinkaid was apparently under the influence of alcohol. The evidence regarding Kinkaid's overservice was closely enough related in time to make the postaccident evidence relevant.

D. ARGUMENT

(1) Standard of Review for Motions for Judgment as a Matter of Law

The Court of Appeals articulated this Court's standard for motions seeking judgment as a matter of law, op. at 4-5, but then promptly disregarded the central focus of this Court's off-expressed standard:

> Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Such motion can be granted only when it can be said, as a matter of law, there is no competent and substantial evidence upon which the verdict can rest.

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (citations omitted). In a recent formulation, this Court stated in *Schmidt v. Coogan*, 162 Wn.2d 488, 493, 173 P.3d 273 (2007), a court should grant

judgment as a matter of law *only* in "circumstances in which there is *no doubt* as to the proper verdict." (Emphasis added.) This Court requires that the truth of the nonmoving party's evidence must be accepted by the trial court, and the court must draw *all favorable inferences from that evidence that may reasonably be evinced from it. Davis v. Globe Mach. Mfg. Co.,* 102 Wn.2d 68, 73, 684 P.2d 692 (1984). Credibility decisions are for the jury. In *Morse v. Antonellis*, 149 Wn.2d 572, 70 P.3d 125 (2003) this Court stated that an appellate court may not substitute its judgment for that of the jury and reversed a Court of Appeals decision determining negligence as a matter of law. "Juries decide credibility, not appellate courts." *Id.* at 575. The Court of Appeals here essentially looked at the evidence from the perspective of the Moose defendants, rather than the Fausts as the nonmoving party. The court neglected the *inferences* the jury could make from the evidence presented and the jury's credibility decisions.[3]

[3] The Moose defendants argued a new standard for motions for judgment as a matter of law claiming that a court can choose to disregard the verdict of the jury and only give weight to certain evidence. Answer to Pet. for Review at 7. This is not the standard under Washington law. In considering such a motion for judgment as a matter of law, as noted above, just like a trial court, the Court of Appeals was obliged to treat the evidence and the inferences from the evidence in a light most favorable to the Fausts as the nonmoving party. The Court of Appeals did not do so, effectively treating the inferences from the evidence in this case in the light most favorable to the *moving* party.

(2) The Court of Appeals Narrow Interpretation of the Trier of Fact's Ability to Infer that the Patron Was Overserved by Conduct Postservice Is Contrary to *Barrett*

The Court of Appeals opinion acknowledged this Court's opinion in *Barrett*, op. at 5, 6, but neglected to note that this Court adopted a *lower* burden for plaintiffs in overservice cases when it abandoned the common law standard for overservice that imposed liability where a commercial establishment served an "obviously intoxicated" person, substituting instead the statutory standard of serving a patron who was "apparently under the influence of liquor." 152 Wn.2d 273-76. *See* RCW 66.44.200. This Court stated the new standard was less stringent, requiring less certainty. 152 Wn.2d at 267-69. As stated in Kathryn Knudsen, *Serving the "Apparently under the Influence" Patron: The Ramifications of Barrett v. Lucky Seven Saloon, Inc.*, 31 Seattle U. L. Rev. 385, 391-92 (2008), "The majority's opinion in *Barrett* elevated a commercial vendor's duty by requiring reflection and inquiry into whether a person is under the influence at the time of service." Nevertheless, the Court of Appeals opined "the required evidence [to sustain a claim] does not appear to have changed." Op. at 6 n.3. The Court of Appeals then incorrectly applied the cases under the old "obviously intoxicated" standard which expressly permit the inference of intoxication at the time of service from the

postservice conduct of the person who was overserved by the commercial establishment.

This Court's purpose in adopting the new standard was clear: to deter commercial establishments from overserving patrons and thereby protect the public "from the enormous personal and social costs arising from drunk driving accidents." 152 Wn.2d at 274. The Court of Appeals opinion fails to implement this Court's purpose in *Barrett* and undermines the deterrent purpose of the *Barrett* standard. Commercial establishments should not be serving alcohol to patrons who are under the influence, and those establishments know them to be under the influence, given the number of drinks served to such patrons.

The Legislature has also made it clear that blood alcohol content (BAC) evidence is admissible in civil cases in Washington. RCW 46.61.506(1).[4] Washington courts must respect that statutory directive. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 399, 143 P.3d 776 (2006) (Legislature amended RCW 46.61.506 to provide that breath test evidence was admissible). Clearly, once the jury has observational evidence, as it did here from Chapman's admissions to Kinkaid's daughter and a friend,

[4] The Moose defendants imply in their answer to the petition for review at 7-8 that RCW 46.61.506(1) relating to the admissibility of blood alcohol content (BAC) evidence only applies to DUI cases. The Moose defendants misstate the law. RCW 46.61.506(1) *specifically states* that BAC evidence is admissible in civil cases.

the BAC evidence is then firmly rooted in observational evidence about Kinkaid. *Ackerman v. Delcomico,* 486 A.2d 410, 414 (Pa. Super. 1984).

The Court of Appeals was incorrect that the level and nature of proof necessary to prove a claim for overservice of a patron under the *Barrett* standard is the same as that which existed under prior law. Plainly, the appearance of *obvious* intoxication is a higher burden than demonstrating a person is apparently under the influence. By its nature, the new *Barrett* standard makes additional evidence relevant to the "reflection and inquiry" the standard commands. For example, if a person consumes 20 alcoholic beverages over a short period, few human beings could fail to be "under the influence of alcohol" at that level of alcohol consumption and *trained servers should know that.* Knudsen, *supra* at 410 ("Common sense suggests, however, that there must be some point at which the quantity of alcohol served puts the vendor on notice that a patron is intoxicated despite his or her outward, obvious manifestations."). Here, Chapman was with Kinkaid all day. She *knew* how much he had to drink.

This Court should squarely hold that to prove a patron of a commercial establishment was apparently under the influence of alcohol, and nevertheless was served, the jury may infer the patron's appearance at

the time of the overservice from postaccident observations of the patron, scientific evidence, and circumstantial evidence.

Even under the old "obviously intoxicated" standard, the trier of fact could infer intoxication of the patron from postservice conduct. In *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986), a commercial overserving case, the patron consumed 10 drinks before dinner, and 15-20 drinks in a 3.5 hour period. This Court surveyed earlier cases on the evidence from which an inference of the "obviousness of intoxication at the time of service" could arise and concluded that blood alcohol test results were admissible as evidence of intoxication at the time the person was served, but not as evidence of the obviousness of intoxication. *Id.* at 463.[5] Thus, the trial court here properly admitted evidence and expert testimony on Kinkaid's blood alcohol level at the time of the accident and when he was in the Moose Lodge bar. The *Dickinson* court also permitted admission of a trooper's affidavit of his post-accident observations of the defendant, made about 10 minutes after the defendant was last served, that he was unsteady on his feet, had bloodshot eyes, a flushed face, and smelled of alcohol. *Id.* at 464.

[5] RCW 46.61.506(1) specifically permits introduction of blood alcohol results into evidence in civil cases to prove intoxication.

This Court also indicated in *Dickinson* that evidence of the amount of alcohol the defendant consumed was admissible to raise an inference of obvious intoxication. The Court surveyed cases from other jurisdictions in which a patron had consumed large quantities of alcohol in a short time. "We hold that the evidence of the amount of alcohol consumed here raises a material issue of fact as to (1) whether a person in the position of Mr. Edwards would have displayed some outward manifestation of intoxication in advance of ordering and (2) whether a person in the position of the furnisher . . . knew or should have known in the exercise of reasonable care, that the drinker was intoxicated." *Id.* at 465-66. Given the huge quantity of alcohol in Kinkaid's system, the jury properly inferred that he was under the influence of alcohol when served at the Moose Lodge bar.

Similarly, in *Fairbanks v. J.B. McLoughlin Co., Inc.,* 131 Wn.2d 96, 929 P.2d 433 (1997), an employee left a company banquet between 10 and 10:30 p.m. She was involved in a serious automobile accident at 10:50 p.m. Her BAC, obtained at about midnight, was .17. When confronted by police at about 11 p.m., her speech was slurred, she stumbled getting out of the car, she staggered when walking, and she smelled of alcohol. This Court noted:

> A police officer's subjective observation that the employee was obviously intoxicated shortly after leaving the banquet may raise an inference that she was obviously intoxicated when the employer served her, provided that the employee did not consume any alcohol after leaving the banquet and provided that no time remains unaccounted for between the banquet and the subsequent observation.

Id. at 103. The Fausts met this standard here given the number of drinks Kinkaid had at the Moose Lodge Bar, his bartender girlfriend's admission he was sufficiently under the influence, by her observation, to be cut off, and his smell of alcohol at the accident scene.

In *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn. App. 239, 935 P.2d 1377, *review denied,* 133 Wn.2d 1012 (1997), the Court of Appeals held that a directed verdict was properly denied where various witnesses testified a patron was drunk or tipsy at a restaurant bar and then assaulted a third person. The court found that an expert's testimony on the patron's BAC was relevant to enhance the credibility of the observations that the patron was drunk. *Id.* at 250.

Foreign case law supports the evidentiary burden promulgated in *Barrett.* The New York Dram Shop Act[6] has been described as the

[6] Though a Dram Shop Act is present in New York, its standard is akin to *Barrett.*

statutory embodiment of the public policy that a tavern owner who continues to sell alcoholic beverages to an intoxicated patron, or one *who is apparently under the influence of alcohol* is engaging in tortious conduct for which an injured party may hold him strictly liable. *Bongiorno v. D.I.G.I., Inc.*, 138 A.D.2d 120, 123, 529 N.Y.S.2d 804 (N.Y.A.D. 2 Dept., 1988) (emphasis added).

In *Adamy v. Ziriakus*, the court rejected the contention that the plaintiff was required to establish her Dram Shop cause of action by direct evidence. 231 A.D.2d 80, 84-86, 659 N.Y.S.2d 623 (N.Y.A.D. 4 Dept., 1997), *aff'd*, 92 N.Y.2d 396, 681 N.Y.S.2d 463 (1998). In an action based upon the death of plaintiff's decedent in an automobile accident involving an intoxicated driver who had been served alcoholic beverages in defendant's restaurant prior to the accident, the court held a jury verdict should not be set aside simply because the evidence of the patron's intoxication was circumstantial. *Id.* at 84-86. The circumstantial evidence proving the patron's intoxication included the testimony of the police officers who observed the patron in an intoxicated condition about 45 minutes after he left defendant's restaurant, the amount of alcohol in the patron's blood approximately 90 minutes after the accident, and the opinion of the expert who testified that the patron's BAC while he was at

the restaurant would have been at least .2% and thus he would have been visibly intoxicated. *Id.* at 84-86.

In rejecting the requirement of direct evidence of intoxication, the court noted that while proof of intoxication, established by one's BAC or by the fact that one has consumed a certain amount of alcohol, is not enough, without more, to sustain a statutory cause of action, there was additional proof of the patron's behavior following the accident to supported an inference by the jury that the patron was visibly intoxicated when he left the defendant's restaurant. *Id.* at 85-86.

Similarly, the court in *Martinez v. Camardella*, rejected the argument that the statute required the plaintiff to present direct evidence of the actual amount of alcohol consumed by defendant and proof that a golf club employee actually observed defendant to be in an intoxicated condition when he was served an alcoholic beverage. 161 A.D.2d 1107, 1108-09, 558 N.Y.S.2d 211 (N.Y.A.D. 3 Dept., 1990). The court held the plaintiff had made her prima facie case when she presented evidence that the defendant consumed alcoholic beverages at a wedding reception and that although the quantity of drinks could not be determined with any specificity, he drank enough to become apparently intoxicated during the reception. *Id.* at 1108-09.

The Court of Appeals in this case referenced *Dickinson* and *Fairbanks* in its opinion, op. at 6-7, but stated that these cases stand for the proposition that the postservice evidence must be very close in time to the injury to the victim. Op. at 7-8. Kinkaid had to appear "under the influence" to those around him at the bar in order to allow the inference. Op. at 8-9. However, this Court *rejected* a set time for the postservice evidence in *Dickinson*, stating "It is of little use to set a specific time period within which the observations must be made." *Dickinson,* 105 Wn.2d at 464. In *Fairbanks*, the accident occurred 20 minutes after the patron left the bar. *Fairbanks,* 131 Wn.2d at 103. Here, under the Fausts' evidence, *Kinkaid struck their vehicle about 15 minutes or so after leaving the Moose Lodge bar.*

The Court of Appeals failed to assess the evidence and reasonable inferences from that evidence in a light most favorable to the Fausts. The court discussed Alexis Chapman's admission to Kinkaid's daughter, Rainy, and to Lisa Johnston regarding his drunkenness but parses Kinkaid's appearance at the bar while being served from his appearance when he was finally cut off by Chapman. Op. at 9-12. Chapman admitted Kinkaid was *drunk* at the Moose Lodge bar. The court also ignored the Fausts' other evidence that Kinkaid was drunk at the bar. He had a .32 percent BAC, which could be reached only by ingesting 21 beers or 30

ounces of alcohol. He had unassimilated alcohol in his gut on autopsy. That ingestion occurred between 4:30 p.m. and 7:30 p.m. By her own testimony, Chapman was with him the entire day and served Kinkaid every drink he had from the time he first came to the Moose Lodge bar. From this evidence, the jury could reasonably infer Chapman served Kinkaid at least 21 beers or 30 ounces of alcohol over 3 hours, and the collision occurred 15 minutes after Kinkaid left the Moose Lodge bar.

The Court of Appeals substituted its judgment for that of the jury that plainly understood a person does not become "under the influence of liquor" *all at once.* A jury could reasonably infer here, as the *Dickinson* court contemplated, that Kinkaid was under the influence at the Moose Lodge bar when his bartender girlfriend overserved him.

Finally, under the unique facts of this case, a standard that relies exclusively on the patron's appearance is peculiarly unfair where the other bar patrons have a reason not to remember that patron's actual appearance. All the bar patrons here were *Moose members*; they did not want their Lodge to be liable. The memories of the Moose defendants' witnesses were so selective and their stories about Hawkeye Kinkaid's actions were so plainly contrary to scientific data and the facts in this case, and their alternate explanations for his drunkenness so implausible, this Court

should not reward their "conspiracy of silence." The jury did not credit their testimony. Its credibility determination was a vital part of its verdict.

A jury should be able to infer that a patron was under the influence of alcohol from evidence that arises post-service, such as BAC results, autopsy findings, or observations of that person and his or her behavior. As this Court observed in *Barrett,* the purpose of permitting third persons to have a civil cause of action against a commercial establishment for overserving patrons is to deter such overservice and avoiding having drunks on the road. *Barrett,* 152 Wn.2d at 273, 274. This is also the policy rationale that prompted the Legislature to *mandate* training of alcohol servers like Chapman. RCW 66.20.320.[7]

The Court of Appeals analysis only encourages overservice. It gives license to commercial establishments to serve persons who are clearly drunk, but do not exhibit *obvious* signs of drunken behavior. A person who enters a bar and orders 20 drinks from the same server over a

---

[7] The Legislature found with respect to training of alcohol servers:

> ... that education of alcohol servers on issues such as the physiological effects of alcohol on consumers, liability and legal implications of serving alcohol, driving while intoxicated, and methods of intervention with the problem customer are important to protecting the health and safety of the public. The legislature further finds that it is in the best interest of the citizens of the state of Washington to have an alcohol server education program.

Laws of 1995, ch. 51, § 1.

short period by simply waving for another drink, but does not fall off his barstool, *is just as dangerous to drivers on the road* when he leaves the bar as the patron who is "falling down" drunk. The server should know better, and is trained to know that such a patron is apparently under the influence of alcohol and should not be served drinks. Chapman ignored her training to overserve her boyfriend. A jury is entitled to apply its real world experience to infer that the patron served 20 drinks was apparently under the influence of alcohol at the commercial establishment after that patron causes harm to others on the road. The rule allowing the jury to infer overservice from postservice evidence as articulated in *Dickinson* and *Fairbanks* better implements *Barrett* and RCW 66.44.200.

E. CONCLUSION

Hawkeye Kinkaid arrived at the Moose Lodge bar sober and left exceedingly drunk. He operated a vehicle and smashed into the Faust vehicle, irrevocably changing their lives. The Moose defendants' negligence and Kinkaid's irresponsibility tragically and irreparably damaged the lives of Bianca Faust, her two children, and the rest of the family. After a long, fair trial, the jury rendered a verdict in the Fausts' favor. The Court of Appeals should not have invaded the jury's province and taken away that verdict.

This Court should reverse the Court of Appeals and reinstate the trial court's judgment and the order denying the Moose defendants' posttrial motions. Costs on appeal should be awarded to the Fausts.

DATED this 3d day of November, 2008.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Steve Chance, WSBA #19765
Steve Chance, Attorney at Law, P.S.
119 N. Commercial St., Suite 275
Bellingham, WA 98225
(360) 676-9700

James DeZao, NJBA #170288
(admitted pro hac vice)
DeZao & DiBrigida
322 Route 46 West, Suite 120
Parsippany, NJ 07054
(973) 808-8900
Attorneys for Petitioners Faust

APPENDIX

RCW 46.61.506(1):

> Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

COURT'S INSTRUCTION NUMBER 12 TO THE JURY:

> An establishment, such as the Moose Lodge, owes a duty to third persons not to serve alcohol to a person who is apparently under the influence of alcohol.

CP 1120.

COURT'S INSTRUCTION NUMBER 13 TO THE JURY:

> Whether a person was apparently intoxicated or not is to be determined by the person's appearance to others at the time the alcohol was served to the person. Neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was served alcohol while apparently under the influence.

CP 1121.

COURT'S INSTRUCTION NUMBER 14 TO THE JURY:

> "Apparently" is defined as, in an apparent manner: seemingly, evidently or readily perceptible to the senses.

CP 1122.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

BIANCA FAUST, Individually and as guardian of GARY C. FAUST, et al Petitioner/Plaintiff vs. MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINCAID, deceased, et al Respondent/Defendant	No. 03-2-00859-8 ORDER ON DEFENDANTS' POST-TRIAL MOTIONS

This matter having come before the court on the motions of Defendant post-trial, the court having heard the argument of counsel and having considered the written submissions of the parties, does hereby issue the following order on the motions of the Defendant, in the order in which the motions were presented to the court.

A. THE MOTIONS AND DISCUSSION

I. MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants' motion for Judgment as a Matter of Law rests on both legal and factual bases. The legal ground is that evidence of over-service of alcohol is insufficient if it does not include a direct observation by the witness of behavior of the allegedly over-served person. The factual ground is that the record does not include such evidence. Both of these arguments were presented in pre-trial motions as well. The motions made post-trial are denied for the reasons set out below.

In this case the court's previous ruling that the statements of Alexis Chapman, the bartender at the Moose Lodge, was sufficient evidence of behavior evidencing that Hawkeye Kincaid was apparently under the influence of liquor reflects the determination by the court that the person serving the alcohol directly to Kincaid, who has a personal knowledge of him and his behavior, is well placed to observe those behaviors. Those statements provide sufficient evidence to take the case to the jury for determination as to liability.

839

The factual prong of this motion addresses the testimony of Ron Beers, Rainy Kincaid and Lisa Johnston. The court previously ruled that the deposition of Beers was admissible due to his unavailability and that the other statements, reciting admissions of Defendant Chapman, were likewise admissible as admissions of a party opponent. In these statements, it was declared that Hawkeye Kincaid had too much to drink or was drunk, shouldn't have been driving, and should have been cut off from further service. It is for the jury, then, to decide from these statements whether or not the last service of alcohol, based on the bartender's familiarity with Hawkeye Kincaid, was over-service.

Other evidence of Hawkeye Kincaid's blood alcohol level was not the sole evidence on which the jury's decision is based, but merely supporting evidence. The jury was so instructed (Instruction 13), and the jury is presumed to follow the court's instructions. Without the statements of the bartender Chapman, Defendants' motion would be granted, but that is not the situation that the court is presented with.

Finally, Defendant seeks a new trial on the issue of the negligent hiring claim, arguing that it is subsumed into the over-service claim. For the same reasons as set out above in regard to the over-service claim, this motion is denied.

II. MOTION FOR NEW TRIAL ON LIABILITY AND DAMAGES

This motion is made in the alternative to the previous motion. It is based on the same claims as discussed above, and on allegations which will be addressed below in the order they were presented in the motion and which are related to CR 59(a) (1), irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; (2), misconduct of prevailing party; (8), error in law occurring at the trial and objected to at the time by the party making the application; and (9), that substantial justice has not been done.

A. Mac Pope and Alcohol

Witness Mac Pope testified as to his supposed contact with Hawkeye Kincaid on the night of the accident. At trial he exhibited the odor of intoxicants which was evident to the court and Plaintiffs' counsel. With the proximity to the jury of the witness chair this may also have been noted by jurors. At sidebar, Plaintiffs' counsel asked to be able to inquire on recross as to whether he had been drinking. The court determined that this inquiry might lead to proper evidence regarding his credibility as a witness in view of the possibility that the jury could detect the odor observed by the court. He denied consuming alcohol on the day of his testimony, and that ended the inquiry. Mr. Pope's memory was effectively impeached by other questioning so the issue of his consumption of alcohol on the day of trial is cumulative to that. It is the opinion of the court that this was an ancillary part of the evidence, that it bore solely on the credibility of the witness, his ability to relate accurately at trial his recollections, and that all that it established is that Mr. Pope maintained that he had not been drinking. In view of the minor role that Mr. Pope's testimony played in the trial, it is not unduly prejudicial and it is not a ground for new trial.

B. Alexis Chapman's Alleged Over-service of Kincaid on Prior Occasions

After hearing on a motion in limine, the court limited evidence of over-service of alcohol by Defendant Chapman to those times when she is alleged to have over-served Hawkeye Kincaid. This evidence is admissible to prove absence of mistake or accident on the part of the Defendant on the day of the incident, as well as knowledge of the behavior of Hawkeye Kincaid when over-served. All relevant evidence has some prejudicial value. In this case whatever prejudice it contained did not outweigh the probative effect. It provided a basis for the jury to evaluate Chapman's own testimony about how she knew when to stop service of alcohol. As noted by the Defendants in their motion, the testimony was not altogether conclusive as to the incidence of over-service. There is nothing presented to support a conclusion that the jury used this evidence other than for the limited purposes set out above. As to the testimony from Ron Beers in this regard, the evidence was relevant as to knowledge of the members of the Moose Lodge. Defendants allege that it was non-specific as to time, date, etc, which goes to the weight rather than to the issue of admissibility. This is not a basis for a new trial.

C. Double Hearsay Admitted Via State Trooper Van Diest's Testimony and Report

Defendants' objections to this evidence were overruled as the Trooper's report was submitted as one of Defendants' ER 904 documents. There was no objection to the document filed by Plaintiffs. Defendant cannot now object to the document, having first offered it. The trooper's testimony was consistent with the report.

D. Kincaid's BAL and Other Toxicological Evidence

This part of the motion addressed the use of evidence other than that of direct observation of the allegedly intoxicated person to prove that Hawkeye Kincaid was apparently affected by alcohol on the day in question. As noted above, once the determination has been made that the statements of Alexis Chapman are sufficient to take the case to the jury, other evidence my be introduced that is consistent with that allegation. Clearly, Washington law does not allow this evidence as sole proof of the issue of being apparently under the influence at the time of service, but may be introduced once that threshold has been crossed.

E. Ron Beers' Declaration

Beers' declaration was admitted for the limited purpose of impeachment of the testimony given in his deposition. He was unavailable for trial. The court gave a limiting instruction on the use of the statement, reasoning that the evidence provided form other witnesses about how the statement was created and obtained would allow its use to impeach had Beers been present in court as a witness. Extensive cross-examination was had of Mr. Beers at his deposition. After considering the entire set of circumstances around this deposition and statement to impeach, the court is convinced that the value of the Beers testimony is very limited and that use of the statement to impeach, combined with the limiting instruction, is consistent with the evidentiary rules and their application.

F. Demonizing Defendants as a Nefarious Secret Society to Discredit Defendants

This ground for the motion is based on one exchange of questions between Plaintiffs' attorney DeZao and John Leibrant of the Moose Lodge. Defendants' motion mentions the Ku Klux Klan but that name does not appear in the testimony or questions. In fact, it was the witness who volunteered the term "white hoods". The remainder of the inquiry is innocuous. There was no racial or other improper allegation nor was there even any remote reference to anything similar. Certainly, the testimony of the lodge members and their reluctance to share information was clear from the testimony of all of the lodge members as a whole. The implication that they were drawing close together to protect the lodge is something left to the jury to determine. Defendants present no evidence to show that the jury decision was somehow tainted in this way.

G. The Negligent Hiring/Supervision Claim

Defendants' allegation that the negligence claim is untenable have been determined by the court in earlier rulings, and those rulings need not be repeated here. It should be noted that the testimonial evidence objected to is that of industry practices and standards, a common basis for determining the existence of negligence. The objections go to the weight rather than the admissibility of the evidence, and therefore becomes the province of the jury.

G. Questions Re: Discovery of the Membership List

Defendants' contention is that allowing testimony as to the fact that the membership list of the Moose Lodge was not produced until ordered by the court is improper. In light of the nature of the testimony given by the various lodge members which the jury could clearly have believed indicated an unwillingness to reveal facts detrimental to the lodge's position, the single inquiry as to this fact is minor and merely cumulative to the other testimony. Use of the fact in argument is not improper in light of the instruction to the jury, given both prior to trial and after trial, that the statements of the attorneys are not evidence. This testimony was not irrelevant as it relates to the lodge members' credibility and motives.

H. Passion and Prejudice

The questions mentioned in this section were propounded by Plaintiffs' counsel, and objections were sustained in each case, including the striking of an answer and advisement of the jury to that effect. There is nothing to set these questions apart from others to which an objection was raised and sustained. The jury was instructed on the issue of objections, and is presumed to follow that instruction. Although the questions may have, in fact, pushed beyond the limits of the court's rulings on the motions in limine, they are not remotely sufficient to support a new trial.

I. Instructional Errors

Instruction #3: The standard instruction was given in this case and is sufficient to properly state the law for the jury. As there was direct evidence of apparent intoxication, there is no need to amend the approved instruction. Defendant remained free to argue the weight and sufficiency of the evidence to the jury.

Instruction #5: As there was a passing mention of insurance in the testimony, this instruction as properly given.

Instruction #14: The court's decision to give the definition of "apparently" was based on the language of the *Barrett* v. *Lucky 7 Saloon, Inc.* decision but was a shorter, more concise version. The entire *Barrett* definition is repetitive and the meaning is conveyed in the version given. The court believes that the version given is sufficient, particularly where Defendant has not shown how the longer version would be more effective or better reflected the state of the law.

Instruction #19: This will be discussed below in section IV.

Defendants' Proposed Instruction #29: This will be discussed below in Section IV.

The Special Verdict Form: Defendant sets out no authority or reasoning to support its objection in this motion, and the court will rely on its decision at trial regarding the special verdict form.

III. MOTION FOR NEW TRIAL ON DAMAGES ONLY

Defendants contend that the damages awarded are the result of passion or prejudice because they are grossly excessive and exceed the bounds of fair and reasonable compensation. The gist of the contention is that the testimony of Dr. Joan Gold was not on a "more probable than not" basis and that the inclusion of testimony from the life care planner Helen Woodard and the economist Robert Moss compounded the error. The court determined before and during trial that the testimony was sufficiently based on the doctor's medical expertise and knowledge and that she gave testimony which was admissible. The motions contain no reference or citation to the portions of the depositions that would support Defendants' contentions. Therefore, these rulings will stand as previously made. The Defendants have not provided any additional basis for the court to revise or reverse its prior rulings.

IV. MOTION FOR REMITTITURS

This presents the most significant issue for the court in this series of motions. Defendants note that jury members admitted in post-trial discussions that they had determined the amount to award for future surgery for Bianca Faust on the experience that one juror had with prior, albeit different, orthopedic surgery. The testimony at trial was that Bianca Faust

843

would likely require orthopedic surgery to replace a joint in the future. However, it is the opinion of the court that there has not been a sufficient showing of impropriety. The jury was given costs through the testimony of the two life care planners (one presented by each side). The life care plans themselves were not introduced into evidence and were not before the jury in their deliberations. With regard to this one element of the award to Bianca Faust a member of the jury related that the jury had discussed the cost of surgery that one juror had undergone. There is no affidavit in the record from any member of the jury contending that the sole basis for calculation was this prior juror surgery. It cannot be said that the discussion after the trial was completed was conclusive as to the method that the jury used to determine damages, and it is the opinion of the court that the jury's processes are inherent in the verdict. Without supplemental information that the jury disregarded the testimony at trial and, instead, substituted another cost, the court cannot say that the verdict is the result of passion or prejudice. Likewise, the court cannot find, on the basis of the submission with the motions, that the jury disregarded the evidence presented or otherwise acted improperly in reaching its verdict. The economic and non-economic damages are within the ranges given in testimony and cannot be said, on the record before the court, to be excessive or unsupported by the evidence at trial.

B. ORDER

Based on the motions, the argument of counsel, and the discussion above, it is hereby ordered that the Post-Trial Motions of the Defendant are denied.

SIGNED this the 11 day of January, 2006.

JUDGE

DECLARATION OF SERVICE

On said day below I deposited in the U. S. Mail a true and accurate copy of the attached document: Fausts' Supplemental Brief, Motion for Overlength Brief, Supreme Court Cause No. 81356-6, to the following:

Steve Chance
Attorney at Law
119 N. Commercial Street
Bellingham, WA 98225

James DeZao
Attorney at Law
322 Route 46 West, Suite 120
Parsippany, NJ 07054

Russell C. Love
Thorsrud, Cane & Paulich
1325 4th Avenue, Suite 1300
Seattle, WA 98101

Paul Esposito
Clausen Miller P.C.
10 South LaSalle Street
Chicago, IL 60603

Original sent by email for filing:
Supreme Court
Clerk's Office
415 12th Street
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 3, 2008, at Tukwila, Washington.

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick